In the Supreme Court of the United States

OCTOBER TERM, 1934.

No. 102.

SAMUEL B. SMITH,
Petitioner,

vs.

E. H. SNOW and E. H. SNOW, doing business as SNOW'S HATCHERIES and SNOW'S INCUBATOR COMPANY,
Respondents.

MEMORANDUM IN ANSWER
to
PETITION FOR REHEARING.

We beg leave to file the following brief answers to the five points recited by the respondents as grounds for rehearing:

I.

It is, of course, impossible, to secure the transfer of "units of heat" * * * "from the eggs in the more advanced stage of incubation to those in the less advanced stage" as called for by claim 1, unless the eggs in the incubation chamber are set at brief intervals. This is "staged incubation" as defined by this Court, and that is all that is required. This Court has held that the result recited is not dependent upon any particular order or arrangement of egg, and has held that the patentee is not confined to the particular procedure outlined in the specification of the patent. It follows necessarily that the particular "staged incubation

of the specification'' was not included in the claim, neither by intention of the patentee, nor by the necessities of the case. The prior art is devoid of the combination of staged incubation *in any form* with the forced circulation of air, and it is not necessary, in order to hold validity, to confine the claim to any particular setting in staged incubation. As this Court said (p. 12) in referring to the prior art:

> ''Such rudimentary experiments with isolated elements of Smith's combination did not anticipate his invention.''

The effect and meaning of the clause at the end of the claim—''for the purpose specified''—was fully treated at page 43 of our main brief in this case, and will not be repeated here.

II.

This Court has given its estimation of the Smith invention in no uncertain terms. The complete revolution worked in this art by Smith's invention—the combination of staged incubation and forced draft—entitles the patent to the liberal construction which has been accorded it. This second ground urged by the respondents is directly contradictory to the Court's holding that:

> ''If the matter were doubtful, it is plain from what has been said that the character of the patent and its commercial and practical success are such as to entitle the inventor to broad claims and to a liberal construction of those which he has made.'' (p. 10.)

III.

The Court thoroughly disposed of the respondents' former contention that they did not employ current movement of air. This portion of the petition is a mere re-hash of the old arguments. The proofs in this case, reviewed by this Court, showed that the air, in respondents' incu-

bator, moves in "current form" through the egg trays. Confusion of air movements in the corridor or at isolated points of the chamber has been held immaterial (p. 14), as of course it is. Claim 1 calls for the application of a current of air to the eggs, and this the respondents employ.

IV.

The fourth ground set forth in the petition merely emphasizes that the Smith invention revolutionized the art of incubation, and the infringers have been legion. That the infringement of the patent has been wide spread emphasizes the fundamental character and value of Smith's invention but is no excuse, nor does it assist the respondents here to point to the fact that numerous others also infringed.

V.

The request for visual demonstration of the incubators is impracticable. The current movement of air in the respondents' machine has been carefully studied, analyzed and portrayed in the various exhibits in the Record.

CONCLUSION.

We trust that, for the reasons set forth in the Petition for Immediate Mandate in the *Waxham* case (No. 208) this Court will promptly dispose of this petition for rehearing. Surely the patentee's right to protection in his invention is paramount to the claim of the infringers. The petition for rehearing is patently for the purpose of staving off the final day of reckoning, no other useful purpose would be served, and the petition should be denied.

Respectfully submitted,

NEWTON D. BAKER,
ALBERT L. ELY.